No.....

IN THE

Supreme Court of the United States

TEXAS AND NEW ORLEANS RAILROAD COMPANY,

Petitioner,

versus

NORTHSIDE BELT RAILWAY COMPANY,

Respondent.

PETITION OF TEXAS AND NEW ORLEANS RAILROAD COMPANY

FOR WRIT OF CERTIORARI

TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Now comes Texas and New Orleans Railroad Company, a corporation, against which the judgment of the District Court of the United States for the Southern District of Texas, Houston Division, as well as the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, affirming the judgment first

mentioned, was rendered in this cause, and petitions for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, sitting at New Orleans, Louisiana, to review the decision of said Court in this cause, and represents and shows to the Court:

I.

Texas and New Orleans Railroad Company, hereinafter styled "PETITIONER", is a corporation created and existing under and by virtue of the laws of the State of Texas, is a resident citizen of Houston, Harris County, in the Southern District of said State, and is there domiciled.

Northside Belt Railway Company, hereinafter styled "RESPONDENT", is a corporation created and existing under and by virtue of the laws of the State of Texas, is a resident citizen of Houston, Harris County, in the Southern District of said State, and is there domiciled.

Counsel for respondent are Nelson Phillips, Esq., of Dallas, Texas, and W. W. Moore, Esq., and J. Y. Powell, Esq., of Houston, Texas.

II.

SUMMARY AND SHORT STATEMENT OF THE MATTERS INVOLVED.

(1) *Brief statement of the issues involved*: The District Court of the United States for the Southern District of Texas held in this cause that Paragraph (18) of Section 1 of the Interstate Commerce Act, as amended by the Transportation Act, 1920, (set out in Appendix A) which provides that no carrier by railroad subject to the Interstate Commerce Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire

or operate any line of railroad, or extension thereof, or shall engage in transportation under the Act over or by means of such additional or extended line of railroad unless or until there shall first have been obtained from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity require or will require the construction or operation or construction and operation of such additional or extended line of railroad, is not applicable to the construction by a new railway corporation of a railroad before the corporation becomes engaged or offers to engage in the actual transportation of interstate freight or passengers; said District Court having held and rendered judgment that said provisions become applicable or effective only when or after a new corporation which has constructed a line of railroad is actually engaged or offers to engage in interstate commerce—that is to say, that while existing railroads already engaged in interstate commerce may not extend their lines or operations without first obtaining a certificate of public convenience and necessity from the Interstate Commerce Commission, new railroad corporations are entirely free from any such regulation and may construct their lines *ad libitum* without a certificate of public convenience and necessity, until such time as they shall actually begin to operate as instrumentalities of interstate commerce.

Petitioner respectfully contends that this holding is erroneous.

The Circuit Court of Appeals affirmed the judgment aforesaid on the ground that (though the suit was to enjoin and restrain respondent from condemning for the purposes of its incorporation certain lands of petitioner, a common carrier subject to the Interstate Commerce Act; to enjoin and restrain the con-

struction by respondent of its line of railroad across said land; to enjoin and restrain the maintenance of said railroad across said land; and to enjoin and restrain the operation of said railroad across said land) the issues had become moot, because at the time of the institution of the suit the condemnation proceedings had been carried to a point where the respondent, plaintiff in said condemnation proceedings, had procured an assessment of damages by special commissioners; and by depositing in the State Court in which said condemnation proceedings were pending double the amount of said award and filing a certain bond had acquired the right under the State law to go upon the land and construct its line of railroad; and because respondent had, with notice of the suit and under cover of night actually constructed its railroad across said land prior to the trial on the merits, notwithstanding the suit also sought to enjoin the maintenance of said railroad and, notwithstanding further, the suit sought to enjoin the operation of said railroad, which operation had not been begun at the time of the trial of the cause and has not yet been begun.

Petitioner respectfully contends that the ruling of the said Circuit Court of Appeals in affirming the judgment of the District Court and in holding that the issues had become moot is erroneous.

(2) *Statement of the pleadings*: Petitioner, Texas and New Orleans Railroad Company, filed its bill in the District Court of the United States for the Southern District of Texas, Houston Division, on June 13, 1925, alleging:

That petitioner is a corporation of the State of Texas, having its domicile in the City of Houston, Harris County, in the Southern District of said State; that respondent is a corporation of the State of Texas,

having its domicile in the City of Houston, Harris County, in the Southern District of said State; that respondent was created and exists for the purpose of constructing, owning, maintaining and operating a terminal railway wholly within the State of Texas and is a common carrier by railroad subject to the Interstate Commerce Act, as amended, and particularly subject to the terms and provisions of the Transportation Act of 1920.

That respondent has projected and is constructing or about to construct a certain main line of railway of the length of about five miles in Harris County, Texas, and has instituted or has caused to be instituted a certain condemnation suit in the County Court at Law of Harris County, Texas, against petitioner for the purpose of condemning and acquiring a right of way 100 feet in width and 1,127 feet in length, comprising about two and 587/1000ths (2.587) acres of land belonging to petitioner and is threatening to go upon and is about to go upon said land and construct thereon an embankment and railroad track or tracks and is about to extend, construct and operate said line of railroad and to engage in transportation under the Interstate Commerce Act and the Transportation Act of 1920 by means of such line of railroad, without having obtained from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity require or will require the construction or operation or construction and operation of the said line of railroad; that said line of railroad is not a spur, industrial, team, switching or side track or a street, suburban or interurban electric railway within the meaning of Paragraph (22) of Section 1 of said Interstate Commerce Act, as amended, but is a terminal railway for the transportation of freight

as a common carrier for hire. Petitioner alleges, on information and belief, that neither the present nor future public convenience or necessity require or will require the construction or operation of said line of railway.

That this is a suit arising under the Constitution and Laws of the United States, that petitioner is a party at interest herein, and that unless the respondent shall be enjoined and restrained from prosecuting said condemnation suit and from constructing, maintaining and operating said line of railway upon and across petitioner's property, which it requires for its own corporate purposes, petitioner will suffer great and irreparable damage, for which it has no remedy at law.

That respondent is actively preparing to press its condemnation suit to trial and to construct, maintain and operate said railway upon and across petitioner's property and that unless immediately restrained and prevented therefrom, its purpose will be accomplished before said cause or petitioner's application for an injunction can be set down and heard. Petitioner prays for a temporary restraining order and, upon hearing, for a perpetual injunction restraining and enjoining the respondent, its attorneys, officers, agents, servants and employees from prosecuting said condemnation suit, and from constructing, maintaining or operating the railroad aforesaid upon or across the property of petitioner.

The bill was duly verified.

Respondent, in its answer, admits the allegations with respect to the incorporation and residence of the parties and that respondent is authorized by its charter to construct, own, maintain and operate a terminal railway as a common carrier and with power of emi-

nent domain. It alleges that "it is wholly and solely an intrastate railroad company and within the State of Texas." It alleges that condemnation suit was instituted, report of the commissioners made and filed, double the amount of the award of the commissioners was deposited in court, and a bond filed pursuant to the State law, all of which it alleges occurred prior to the institution of the suit. It alleges that after the institution of the suit, being unrestrained by any order or writ of the District Court, it constructed its track over and along the property of the petitioner and sets up that, therefore, the issues involved in the suit have become moot and present no ground for equitable relief. It alleges further that it was not and is not in any way engaged in the transportation of commodities as a common carrier—that is, that its operations have not yet begun.

(3) *Trial of the cause and result thereof*: Petitioner's prayer for a temporary restraining order was denied. The cause was set down for hearing and heard on application for an interlocutory injunction and the prayer for such injunction was denied. The cause was heard on the merits on July 15, 1925, when full proofs were taken.

The evidence disclosed without conflict that respondent was and is incorporated as a common carrier under the general laws of the State of Texas and that upon its completion and operation it must of necessity transport interstate as well as state commerce and thereupon be and become subject to the Interstate Commerce Act. That respondent had not applied to the Interstate Commerce Commission for a certificate of public convenience and necessity authorizing the construction or operation of its railroad and that the Interstate Commerce Commission had not issued a

certificate of public convenience and necessity—in short, that respondent had not attempted to comply with the provisions of the Interstate Commerce Act, as amended. It disclosed that prior to the filing of the bill respondent had procured from special commissioners appointed by the County Court at Law of Harris County, Texas, an award of damages to be paid to petitioner for the taking of petitioner's lands for the purposes of respondent's business; that petitioner had thereupon deposited in the County Court double the amount of said award and had filed the bond required by the State statute (Title 52, Revised Statutes of Texas, 1925) and that the cause was thereupon appealed to the County Court for trial *de novo;* that after the filing of the bill and after respondent had notice thereof but before it was served with process, under cover of darkness, respondent had constructed its line of railroad across said property, but that the operation of said railroad had not been begun.

On September 26, 1925, the Court handed down and caused to be filed its opinion holding that no certificate of public convenience and necessity is required to be obtained by a new railroad corporation which has not actually engaged in the transportation of interstate freight or passengers until said corporation shall have completed its line of railroad and begun or offered to begin such transportation, and on October 6, 1925, entered a final judgment on the merits, dismissing the bill, but without prejudice to the right of petitioner to thereafter apply for an injunction against the respondent "if its activities in the future should bring it properly within the purview of the Act of Congress known as the Transportation Act of 1920;" that is, after the respondent should have fully completed the construction of its line of

railroad and should actually have begun the transportation of interstate commerce.

III.

Petitioner, in due course, was allowed an appeal from the judgment aforesaid and duly assigned errors (set out in Appendix B.) with prayer for reversal comprehending the grounds of error which will be presented in this Court, and embracing questions submitted in the Courts below.

IV.

The cause was heard by the appellate court, the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, being Cause No. 4718 as docketed in that Court and on January 8, 1927, said appellate court entered its order and judgment affirming the decree of the District Court on the ground that before the decree appealed from was entered a judgment condemning said land was rendered in said condemnation suit, and respondent had constructed its railroad over said land and was operating same—that, therefore, the suit had become a moot one, it being altogether futile to forbid the doing of things which have already been done. Petitioner shows to the Court that, nevertheless, the condemnation suit was and is still pending on appeal and for trial *de novo*, and, while the railroad had in fact been constructed, there is in the bill a prayer for an injunction against its maintenance, and, further, though operation of the railroad had not and has not yet been begun, operation, being a continuing act, might nevertheless be enjoined, though it had been begun as the construction of the line, having been done after the institution of the suit and with notice thereof, may be undone by mandatory injunction. That thereafter,

in due time, petitioner filed in the United States Circuit Court its motion for a rehearing, which said motion was considered and thereafter was, on February 10, 1927, denied and thereupon the judgment in said cause became and was a final judgment.

V.

A certified copy of the entire record of said cause, including the proceedings in said Circuit Court of Appeals, as an exhibit to this petition, in compliance with Rule 35 of this Honorable Court, is herewith furnished.

VI.

Petitioner is advised and believes, and accordingly submits, that said judgment of the United States Circuit Court of Appeals in said cause is erroneous and that this Honorable Court should require said cause to be certified to it for its review and determination in conformity with the provisions of Section 240 of the Judicial Code.

Petitioner maintains, as it submits will become apparent from what follows, that this cause involves questions of law of gravity and of importance, involving the construction of the Constitution and Laws of the United States and the validity and scope of the Laws of the United States which have been decided below in disregard of the validity, purpose and scope of the statutes of the United States; in that said Circuit Court of Appeals for the Fifth Circuit by affirming said decree of the District Court over the grounds of error assigned by petitioner committed errors which petitioner here now assigns in this Court as follows:

1. The trial court erred in holding that Paragraphs (18) to (22) of Section 1 of the Interstate Commerce

Act, as amended by the Transportation Act of 1920, apply only to common carriers by railroad actively engaged in interstate commerce at the time of the enactment of the Transportation Act of 1920 and to new carriers by railroad only when or after they become actively engaged in such commerce.

2. The trial court erred in holding that respondent might lawfully construct, maintain and operate, as a common carrier, a railroad wholly within the State of Texas without first applying to the Interstate Commerce Commission and procuring from it a certificate that the present or future public convenience and necessity require or will require the construction or operation or construction and operation of such additional or extended line of railroad, notwithstanding respondent is chartered to engage in and must necessarily engage in interstate commerce, and notwithstanding respondent's line of railroad extends or will extend from a connection with existing lines of railroad engaged in interstate commerce to certain industrial plants which are already served by carriers engaged in interstate commerce and subject to the Interstate Commerce Act.

Under the opinion and judgment of the trial court above complained of a railroad company, chartered under the general laws of the State of Texas, may construct and operate a line of railroad extending from the eastern to the western boundary of the State, a distance of some 900 miles, intersecting practically every railroad in the State engaged in interstate commerce, depriving such railroads as much as possible of their intrastate business, thereby partially or wholly incapacitating them from economically and efficiently transporting interstate commerce, and thereby placing a great burden on interstate commerce, without

obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity. This may be done so long as the new line so chartered and constructed shall refrain from engaging in interstate commerce—that is, shall refuse to receive and transport any interstate business—freight, passenger, mail or express — notwithstanding it is chartered as a common carrier, that is, as a carrier of all business, both state and interstate, which may be tendered it with the lawful charges, and notwithstanding it is clear that the railroad is in fact intended, as soon as its construction shall have been completed, to be used in interstate commerce. We cannot conceive that this is the law. Such view is certainly wholly inconsistent with the great principles laid down by this Honorable Court in *Dayton-Goose Creek Railway Company vs. United States,* 263 U. S., 169; *Railroad Commission of California vs. Southern Pacific Company,* 264 U. S., 331; *State of Colorado vs. U. S.,* 271 U. S., 153, and *Texas and Pacific Railway Company vs. Gulf, Colorado & Santa Fe Railway Company,* 273 U. S., 266.

3. The United States Circuit Court of Appeals erred in refusing to pass upon the merits of the case and in holding that all issues presented by petitioner's bill had become moot, although the bill prayed not only for a writ of injunction, enjoining and restraining the respondent therein, its attorneys, officers, agents, servants or employees from prosecuting a condemnation suit that was then, and now, pending in the County Court at Law of Harris County, Texas, but also from constructing, maintaining and operating the terminal railroad upon or across the property of complainant therein.

4. The finding of the United States Circuit Court

of Appeals "that before the decree appealed from was entered, a judgment condemning said land was rendered in said condemnation suit and appellee had constructed its railroad over said land and was operating the same" finds no support in the record, for the reason that the condemnation suit was then pending in the County Court at Law of Harris County, Texas, and is still pending in said Court, and respondent was not operating or attempting to operate its road over and across the lands of the petitioner at the time the case was tried in the District Court of the United States.

5. The United States Circuit Court of Appeals erred in holding, "as the only relief prayed for was action by the Court restraining the doing of things which had been done since this suit was brought, the suit has become a moot one, it being altogether futile to forbid the doing of things which already have been done." The undisputed facts, as disclosed by the record, show that respondent had filed a condemnation suit against petitioner; that the commissioners had made an award; that petitioner immediately appealed to the County Court at Law of Harris County, Texas, where said condemnation suit is now pending; that when the case was tried in the United States District Court the contention that the issues raised were moot was not seriously made; that at the time the case was tried in the United States District Court, as well as at the time of the hearing in the United States Circuit Court of Appeals, respondent was not operating its line as a railroad over and across the land of the petitioner, and petitioner's bill was for an injunction to restrain respondent from further prosecuting said condemnation suit, which was then pending in the County Court at Law of Harris County, Texas, and, as well, to restrain respondent from constructing, maintaining and operating a line of

railroad over and across the land of petitioner. The mere construction of the roadbed and track over and across the petitioner's land, prior to the time the case was tried in the United States District Court, should not deprive petitioner of the right to have the Court pass upon the merits of the case or to issue its injunction restraining respondent from further prosecuting its condemnation suit, then pending, petitioner protesting in the County Court that respondent had no right to further prosecute the condemnation suit until it procured from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity require, or will require, the construction or operation, or construction and operation of such road over and across the land of the petitioner.

As to the condemnation suit: Certain preliminary steps had been taken under which respondent was authorized by the law of Texas, though, in the absence of a certificate of public convenience and necessity, not by the laws of the United States, to go upon petitioner's property and construct its railroad thereon. Trial in the State Court on appeal from the award of the commissioners is *de novo* and the fact that certain proceedings had been had and completed before the commissioners affords and can afford no just reason why further prosecution of the suit should not be enjoined. The track was built *pendente lite* and with notice of the suit. If the track was, as we contend is the case, unlawfully and wrongfully constructed, the Court may and should, by an appropriate order, restore the original condition and not declare the issues moot. An injunction was sought against the maintenance of the track as well as against its operation. It is well settled that where acts and injury are continuing in their nature,

as are both maintenance and operation, an injunction will issue.

However, far from contending, as the Circuit Court of Appeals found in its opinion, that operation of the track had already been begun, respondent vigorously denied in its brief that operation had been begun and it has presented no reason why operation should not be enjoined, save and except that the Act of Congress is too weak to reach it.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may issue out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and of all proceedings in said Circuit Court of Appeals in the said cause, entitled "Texas and New Orleans Railroad Company, Appellant, versus Northside Belt Railway Company, Appellee," No. 4718 on its docket, to the end that said cause may be reviewed and determined by this Court as provided by Section 240 of the Judicial Code, and that your petitioner may have such other or further relief or remedy in the premises as this Court may deem appropriate and in conformity with said provision of the Judicial Code and that the said judgment of the Circuit Court of Appeals, and every part thereof, may be reversed by this Honorable Court and such relief granted as is appropriate to the cause.

TEXAS AND NEW ORLEANS
RAILROAD COMPANY,

By H. M. Garrard
Geo. F. Garrison
J. L. Jalonick
Attorneys for Petitioner.

UNITED STATES OF AMERICA,
THE STATE OF TEXAS,
COUNTY OF HARRIS.

J. H. Tallichet, being duly sworn, says that he is one of the Attorneys and of Counsel for the petitioner named in the foregoing petition for certiorari and is authorized to act for it in this behalf, including the making of this affidavit; that he has read said petition by him subscribed and that the facts therein stated are true to the best of his knowledge, information and belief, but for greater certainty he prays reference to the record herewith presented.

J. H. Tallichet

Sworn to and subscribed before me on this, the 25th day of April, 1927. Witness my hand and seal of office.

C. G. Kehrer

Notary Public in and for Harris County, Texas.

UNITED STATES OF AMERICA,
THE STATE OF TEXAS,
COUNTY OF HARRIS.

I hereby certify that I have examined the foregoing petition and that in my opinion the cause is one in which the writ of certiorari as prayed for may properly be granted by this Court.

J. H. Tallichet

Attorney for Petitioner.

APPENDIX A.

Paragraphs (18) to (22) of Sec. I, Interstate Commerce Act as amended by Transportation Act of 1920.

(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or

the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

(21) The Commission may, after hearing, in a pro-

ceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this Act, and to extend its line or lines: *Provided,* That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this Act which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

APPENDIX B.

ASSIGNMENTS OF ERROR.

Filed Oct. 1, 1925.

In the District Court of the United States for the Southern District of Texas.

(Title Omitted.)

Now comes the appellant Texas & New Orleans Railroad Company, by Garrison & Watson, its attorneys and in connection with its petition for appeal, says that in the record proceedings and in the final decree aforesaid, manifest error has intervened to the prejudice of appellant, to-wit:

I.

The Court erred in not holding that the bill of complaint as well as the evidence introduced upon the trial states facts, sufficient to constitute a cause of action and in denying and refusing appellant's petition of an injunction.

II.

The Court erred in not finding the following facts: That the Eastern terminals of the North Side Belt Railway Company, which begins at the Northwest corner of the American Petroleum Company's property and connecting with the North end of the industrial track of the American Petroleum Company and extending south to the ship channel; that the Industrial track owend by J. S. Cullinan, President of the North Side Belt Railway Company, which is carried in the name of "John Doe," forms a part of the North Side Belt Railway Company and extends from the Eastern terminus of the North Side Belt Railway Company to a connection with the industrial track of the Galena Signal Oil Company, which industrial track connects

with the Texas & New Orleans Railroad Company where interstate freight is both received and delivered; that that a portion of the North Side Belt Railway Company, beginning with the industrial track owned by the Galena Signal Oil Company and extending East to where it connects with the track of the American Petroleum Company, has been used and was being used prior to the filing of appellant's complaint herein, for the purpose of receiving and delivering interstate freight to and from the Texas & New Orleans Railroad Company.

III.

The Court erred in holding that Sections 18 to 22 of the Transportation Act of 1920 do not apply to the construction of a new road, but only apply to common carriers engaged in interstate commerce at the time of the enactment of the Transportation Act of 1920.

IV.

The Court erred in holding as a matter of law that the Transportation Act of 1920 does not apply to new carriers whose line of railroad lies wholly within the State until the new carrier becomes impressed with an interstate character.

V.

The trial Court erred in holding that the Transportation Act of 1920 does not give to the Interstate Commerce Commission jurisdiction over any railroad constructed, when its railroad tracks lie wholly within the State of Texas, until said railroad is completed and begins doing an interstate business.

VI.

The Court erred in holding that the construction of the the North Side Belt Railway neither directly or indirectly burdens or interferes with, affects or is affected

by interstate commerce until the completion of said road and until it actually begins the handling of interstate commerce.

VII.

The Court erred in decreeing that the plaintiff was not entitled to the injunction prayed for, for the reason that the Transportation Act of 1920 did not apply to a road that was being constructed and until the completion of the road, and it was actually engaged in interstate commerce.

VIII.

The decree is against the manifest weight of the evidence.

IX.

The decree is contrary to law.

X.

The Court erred in refusing to grant the application of complainant, Texas & New Orleans Railroad Company, for a temporary injunction restraining the respondents, North Side Belt Railway Company, et al., from building or continuing to build or construct its road bed and track, as prayed for in complainant's original petition pending said appeal to the United States Circuit Court of Appeals for the Fifth Circuit, at Fort Worth, Texas.

Wherefore, appellant prays that the decree of the United States District Court for the Southern District of Texas may be reversed, and that this Honorable Court grant the writ of injunction prayed for, or direct said District Court to grant said writ.

TEXAS & NEW ORLEANS RAILROAD COMPANY,
By BAKER, BOTTS, PARKER &
GARWOOD,
GARRISON & WATSON,
Its Attorneys.

SUPPLEMENTAL ASSIGNMENTS OF ERROR.

Filed Oct. 6, 1925.

In the District Court of the United States for the Southern District of Texas.

(Title Omitted.)

Now comes the plaintiff, Texas & New Orleans Railroad Company and files this its Supplemental Assignment of Error.

The Court erred in refusing plaintiff's application for a stay order, pending final determination of this cause in the Circuit Court of Appeals.

BAKER, BOTTS, PARKER & GARWOOD,
GARRISON & WATSON,
Attorneys for Plaintiff.

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No.....

IN THE

Supreme Court of the United States

TEXAS AND NEW ORLEANS RAILROAD COMPANY,

Petitioner,

versus

NORTHSIDE BELT RAILWAY COMPANY,

Respondent.

BRIEF OF TEXAS AND NEW ORLEANS RAILROAD COMPANY, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The opinion of the District Court in this cause is reported: Texas & N. O. R. R. Co. vs. North Side Belt Ry. Co., 8 Federal Reporter (2nd Series) 153; of the Circuit Court of Appeals: Texas & N. O. R. R. Co. vs. North Side Belt Ry. Co., 16 Federal Reporter (2nd Series) 782.

The judgment sought to be reviewed is that of the Circuit Court of Appeals for the Fifth Circuit (affirming a judgment of the District Court for the Southern District of Texas, Houston Division, entered October 6, 1925,—R. 19-20.) which said judgment was rendered January 8, 1927 (R.——.) and became a final judgment by the overruling of petitioner's motion for rehearing on February 10, 1927. (R.——.)

The specific claim made by petitioner in the courts below was that the taking of petitioner's property under a State statute of eminent domain, and the construction, maintenance and operation thereon by respondent of a railroad, which under its charter is obligated to and which inevitably will engage in interstate commerce, is in violation of paragraph (18) of Section 1 of the Interstate Commerce Act, as amended, and should be enjoined at the suit of the property owner. (R. 3-9.) The Court overruled said claim. (R. 15-19.)

Jurisdiction of this Court is invoked under Section 240 of the Judicial Code.

This is a suit which was instituted in the District Court of the United States for the Southern District of Texas, Houston Division, by Texas and New Orleans Railroad Company against Northside Belt Railway Company to enjoin and restrain the latter, which was engaged in the construction of a railroad without having obtained from the Interstate Commerce Commission a certificate of public convenience and necessity, from (1) condemning, under a State statute, certain property of complainant, (2) constructing its railroad on said property, (3) maintaining, and (4) operating said railroad on said property. (R. 3-9.)

The Court refused to enter a temporary restraining order prayed for by petitioner; and, having set the matter down for hearing, denied the prayer for an interlocutory injunction. On trial of the case on the merits, full proofs having been taken, the Court denied the application for an injunction and dismissed the bill,—all on the ground that a newly created railroad company, whose line lies wholly within a State has the right to acquire property by condemnation, build its railroad, maintain and operate it without regard to the

Federal statutes, and becomes subject to said statutes only after it has actually engaged or offered to engage in interstate commerce,—this in the face of the statute which requires a certificate of public convenience and necessity as a condition precedent to the construction, extension and operation of a railroad. (R. 15-20.)

Petitioner appealed to the United States Circuit Court of Appeals for the Fifth Circuit, which erroneously affirmed the judgment of the Court below, holding that the case had become moot.

The assigned errors here intended to be urged are:

1. The Court erred in holding as a matter of law that the Transportation Act of 1920 does not apply to new carriers whose line of railroad lies wholly within the State until the new carrier becomes impressed with an interstate character. (R. 26.)

2. The trial Court erred in holding that the Transportation Act of 1920 does not give to the Interstate Commerce Commission jurisdiction over any railroad constructed, when its railroad tracks lie wholly within the State of Texas, until said railroad is completed and begins doing an interstate business. (R. 26.)

3. The decree is contrary to law. (R. 27.)

4. The cause has not become moot.

Petitioner now seeks a writ of certiorari, petition for which is filed herewith. In support thereof it respectfully submits the following brief reference to some of the decisions and to the statutes which govern the matter.

ARGUMENT.

I.

The Interstate Commerce Commission has continuously asserted its jurisdiction under the Interstate Commerce Act to give or withhold its permission for the

construction of new lines wholly within the boundaries of a particular state and that jurisdiction has not hitherto been challenged.

Construction of line by North & South R'y. Co., 86 I. C. C. 463;

Construction of line by Jefferson & Southwestern R'y. Co., 76 I. C. C. 778 (Application denied);

Construction of line by Mississippi R'y 82 I. C. C. 698;

Application of Golden Belt Ry., 771 I. C. C., 232 (Application denied);

Application of National Line R. R. Co., 71 I. C. C., 556 (Application denied);

Application of Longview, Portland & Northern, 79 I. C. C. 805;

Application of Shreveport & Northeastern R. R., 71 I. C. C. 586 (Application denied);

Application of Kansas, Oklahoma & Southern R. R., Co., 71 I. C. C. 130;

Application of Ft. Wayne Union R. R. Co., 79 I. C. C. 442;

Application of Uvalde & Northern R'y, 67 I. C. C. 204; 67 I. C. C. 554;

Application of Golden Belt R. R. of Kansas, 67 I. C. C., 370;

Application of Coon Bayou & Arkansas City R'y, 65 I. C. C., 701;

Application of Michigan Northern R. R., 65 I. C. C. 480.

Paragraph (18) of Section 1 of the Interstate Commerce Act is, in part, as follows:

> "After ninety days after this paragraph takes effect, no carrier by railroad, subject to this act, shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation

> under this act, over, or by means of, such additional or extended lines of railroads, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require, or will require, the construction, or operation, or construction and operation, of such additional or extended lines of railroads; and no carrier by railroad subject to this act shall abandon all or any portion of a line of railroad or the operation thereof unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

An administrative ruling by a government department long adhered to is given weight by the Courts in determining the proper interpretation to be placed upon a statute.

In Kern River Company v. U. S., 257 U. S., 147, 66 L. Ed. 175, 179, Mr. Justice Van Devanter, speaking for the Court, said:

> "Even if the meaning of a Federal Statute were not otherwise made plain, we should be slow to reject the construction thus put on the section by the head of the department charged with administering it." Citing Logan v. Davis, 233 U. S., 613, 58 L. Ed. 1121, 1128, in which the Court referred to: 'The settled rule that the practical interpretation of an ambiguous or uncertain statute by the executive department charged with its administration is entitled to the highest respect, and, if acted upon for a number of years will not be disturbed except for very cogent reasons'."

II.

In order to determine whether paragraph (18) of Section 1 of the Interstate Commerce Act as amended by the Transportation Act of 1920 was intended to apply only to roads existing at the time of its passage,

it may be helpful to examine the authorities to ascertain the purpose of the passage of this Act.

In the case of Dayton-Goose Creek R'y Co., vs. United States, 263 U. S. 169, Chief Justice Taft said:

> "In the New England Divisions Case, 261 U. S. 184, it was pointed out that the Transportation Act adds a new and important object to previous interstate commerce legislation which was designed primarily to prevent unreasonable or discriminatory rates against persons and localities. The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged.
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> "It was insisted in the two cases referred to and it is insisted here, that the power to regulate interstate commerce is limited to the fixing of reasonable rates and the prevention of those which are discriminatory, and that when these objects are attained, the power of regulation is exhausted. This is too narrow a view of the commerce clause. To regulate in the sense intended is to foster, protect and control the commerce with appropriate regard to the welfare of those who are immediately

concerned, as well as the public at large, and to promote its growth and insure its safety."

In the case of Railroad Commission of California v. Southern Pacific Co., 264 U. S. 331, the Supreme Court again had under the consideration Sections 18 to 22 of the Transportation Act of 1920. The Railroad Commission of California sought to require certain railroads entering the City of Los Angeles to construct a Union Depot. The contention was made on the part of the railroad companies that under the Transportation Act the Railroad Commission of California was without authority to compel them to build a Union Depot unless a permit was procured from the Interstate Commerce Commission, it was contended that paragraphs 18 to 22 of Section 402 of the Transportation Act applied only to the extension of railroads and did not apply to the building of Union Depots. In passing upon this question, Chief Justice Taft said:

"Section 405, amended Section 3 of the Interstate Commerce Act (Comp. St. Ann. Supp. 1923, Par. 8565), provides in its third paragraph that all carriers shall afford all reasonable facilities for the interchange of traffic between their respective lines and for forwarding and delivering passengers. Paragraph 4 provides that the Commission may, in the public interest and without impairment of a carrier's power to handle its own business with its terminal facilities, require the use of its terminal facilities, including its main line track or tracks for a reasonable distance outside of its terminal for another carrier or carriers, upon such terms as may be agreed upon by the parties, fixed by the Commission or determined by suit as in condemnation proceedings.

"It is obvious from the foregoing that Congress intended to place under the superintending and fostering direction of the Interstate Commerce

Commission all increased facilities in the matter of distribution of cars and equipment and in joint terminals, in the exchange of interstate traffic and passengers between railways so as to make it prompt and continuous. It not only provides for the temporary expropriation of terminals and main track of one railway to the common use of one or more other railways in an emergency, but it also contemplates the compulsory sharing of one company's terminals with one or more companies as a permanent arrangement. This is a drastic limitation of a carrier's control and use of its own property, in order to secure convenience and dispatch for the whole shipping and traveling public in interstate commerce. It gives to the Interstate Commerce Commission the power and duty, where the public interest requires, to make out of what is the passenger and freight station of one interstate carrier a union station or depot.

"The purpose of Congress to prevent interstate carriers from incurring expense which will lessen their ability to perform well their interstate functions is further shown in Section 439 of the Transportation Act (Comp. St. Ann. Supp. 1923, Par. 8592a), whereby the Interstate Commerce Act is amended by insertion of Section 20a. This new section subjects to the approval or rejection of the Interstate Commerce Commission the issue by an interstate carrier of all future shares of stock, bonds, or other evidence of indebtedness, and forbids approval unless the Commission finds that their issue is for a lawful purpose, is compatible with the public interest, is appropriate and necessary to the discharge of its public duty as a common carrier, and will not impair its ability to perform that service." * * * * * *

"We are advised by statements at the bar that after the California Supreme Court handed down its decision in this case, the City of Los Angeles filed a petition with the Interstate Commerce

Commission, asking for an order to provide, maintain, and use a union station, that a hearing followed, and that, pending the decision in this court, the matter is held under consideration.

"For the reasons given, we think the course taken by the city of Los Angeles was the correct one. Until the Interstate Commerce Commission shall have acted under paragraphs 18 to 21 of section 402 of the Transportation Act, the respondent railways cannot be required to provide a new interstate union station and to extend their main tracks thereto as ordered by the State Railway Commission."

Reference is also made, in this connection to the recent cases:

State of Colorado vs. U. S., 271 U. S. 153.
Tex. & Pac. Ry. Co., vs. Gulf, C. & S. F. Ry. Co., 273 U. S. 266.

III.

It is submitted that the United States Circuit Court of Appeals erred in holding that all issues presented in the bill of complaint by petitioner had become moot. The Court said:

"It is disclosed by the record that no restraining order or interlocutory injunction was issued, and that, before the decree appealed from was entered, a judgment condemning said land was rendered in said condemnation suit, and appellee has constructed its railroad over said land and was operating the same. As the only relief prayed for was action by the court restraining the doing of things which had been done since the suit was brought, the suit has become a moot one, it being altogether futile to forbid the doing of things which already have been done."

This finding of fact by the United States Circuit Court of Appeals in view of the record, is rather re-

markable. The undisputed facts, as disclosed by the record, show: That on or about the 8th day of June, 1925, respondent duly filed proceedings for the purpose of condemning a right-of-way across the land of petitioner; that such proceedings were duly prosecuted, resulting in an award to complainant of Seven Hundred Fifty ($750.00) Dollars; that following the condemnation proceedings, respondent deposited with the County Clerk of Harris County, Texas, the sum of $1500.00, double the amount of the award, and became entitled, under the State Statute to take possession of the land in question on the 13th day of June, 1925.

That immediately following the award of the Commissioners, petitioner gave notice of appeal, under and by virtue of the Statute of the State of Texas, to the County Court at Law of Harris County, Texas, where said condemnation proceedings are now pending, awaiting the final result of this suit. That about the time of the hearing before the Commissioners, petitioner filed and presented to the United States District Judge, a bill for injunction, praying that respondent be temporarily and on hearing, perpetually, restrained from prosecuting its condemnation suit, as well as from constructing, maintaining, and operating its railroad over and across the land of petitioner; that the United State District Judge refused to grant a temporary injunction, but set the case down for hearing, requiring respondent to appear within five days and show cause why said injunction should not be granted.

That respondents, immediately after being advised of the fact that said temporary injunction had been denied by the court, procured an extra force and built its track over and across petitioner's land, completing

same at about 11:30 o'clock, P. M. on June 13th, 1925.

The condemnation proceedings in the County Court at Law where they will be tried *de novo*, were pending at the time the case was tried in the United States District Court, at the time when the opinion was rendered by the United States Circuit Court of Appeals for the Fifth Circuit. They are still pending, and if the relief prayed for herein is granted, must fall, with the rights which respondent is wrongfully exercising under them. (R. 33.)

The work of constructing the track, so hurriedly done, may and should be undone.

In Corpus Juris, Volume 32, Page 24, When An Act Has Been Completed Pendente Lite, the rule is laid down as follows:

> "Where defendant has fully completed the act sought to be restrained, after the filing of the bill but before the issuance of any order or decree, the court has power to compel by mandatory injunction the restoration of the former condition of things, and thereby prevent the gaining of an advantage by reason of the wrongful act, provided plaintiff has been guilty of no wrongful acquiescense or delay. Where defendant does an act which the bill seeks to enjoin, he acts at his peril and is subject to the power of the court to compel a restoration of the statutes, or to grant such other relief as may be proper under the particular circumstances of the case."

In the case of St. Louis S. F. Railroad Company vs. Cross, 171 Federal, it was held:

> "It is also insisted in support of the demurrer that the defendant Meyer actually made the declaration against the complainant, revoking its authority in the state. In the amended bill it is alleged that the signing of the instrument was 'subsequent to the institution of the suit.' It

bears date one day later than that of the filing of the original bill and of the preliminary order restraining its issuance, but on the day of service of the order. Presumably it was executed before the order became effective or was served. It does not appear that 'a foreign domicile' was alleged in the petition for removal or was the ground of the declaration; but assuming that such domicile was alleged, and the fact certified to the Secretary as contemplated in the legislative act, still must the relief prayed for be denied because the declaration shortly preceded the time when the order became effective or was served? The point is highly technical and goes to an avoidance of a decision on the merits. It is not available. This court had acquired jurisdiction over the subject-matter of the suit before the defendant acted, and he could not therefore prejudice or defeat the rights of the complainant. In such a case a court of equity has ample 'power to compel by mandatory injunction the restoration of the former conditions of things,' and prevent the gaining of advantage by reason of the wrongful act. 22 Cyc. 743; Ex parte Lennon, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110; High on Injunctions (4th Ed.) No. 5a; Bishpam's Prin. Eq. 400; Gibson's Suits in Chancery, No. 824. The demurrer will be overruled."

The railroad having been wrongfully and illegally constructed on petitioner's property, its maintenance may be enjoined, and in any event, operation being a continuing act, may be enjoined, even though begun prior to the trial. In fact operation has not yet been begun. Los Angeles Water Co. vs. Los Angeles, 88 Fed. Rep. 720; Surrall vs. Am. Tel. Co., 224 Ill. 266.

That the case is not moot, see the following authorities:

"A moot case is one which seeks to determine an abstract question which does not arise upon

existing facts or rights." Adams vs. Railroad Company, 44 Lawyer's Reports, Annonated, 273.

"A 'moot case' is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy. Ex-parte Steele, 162 Fed. 694, 702."

"The fact that a suit may be a friendly one would not of necessity render it a 'moot case,' which is defined as one which seeks to determine an abstract question which does not rest upon existing facts or rights. State v. First Catholic Church of Lincoln, 128 N. W. 657, 658, 88 Neb. 2."

"A 'moot case' is one which seeks to determine an abstract question which does not rest upon existing facts or rights.' 'It is universally understood by the bench and bar . . . . . that a moot case is one which seeks to get a judgment on a pretended controversy when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason cannot have any practical legal effect upon a then existing controversy.' Where a request is made of a public officer to perform an act under a statute, and he, although believing that the law requires its performance, refuses because of a doubt on the subject and because he wishes the question to be quickly and finally settled by the decision of a court, a proceeding brought by the state to compel such action on his part is not fictitious. State v. Dolley, 108 Pac. 846, 82 Kan. 533 (quoting Adams v. Union Railroad Co., 42 Atl. 517, 21 R. I. 140, 44 L. R. A. 273; Ex-parte Steele, 162 Fed. 694, 701)."

It is respectfully submitted that the petition should be granted.

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